

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANTHONY COLEMAN,

Plaintiff,

vs.

AMERICAN HOME MORTGAGE
SERVICING, INC.; POWER DEFAULT
SERVICES, INC.; T.D. SERVICE
COMPANY; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
AMERICAN HOME MORTGAGE
ACCEPTANCE INC.; and DOES 1–25,

Defendants.

Case No.: 2:11-cv-00178-GMN-VCF

ORDER

Pending before the Court is the Motion for Summary Judgment (ECF No. 108) filed by Defendant T.D. Service Company (“T.D. Service”). Plaintiff Anthony Coleman (“Plaintiff”) filed a Response (ECF No. 114) and T.D. Service filed a Reply (ECF No. 117). Thereafter, on March 14, 2014, the Court held a hearing during which the Court denied the Motion for Summary Judgment. This written order follows.

I. BACKGROUND

This action arises out of foreclosure proceedings initiated against the property of *pro se* Plaintiff Anthony Coleman. Plaintiff gave lender, American Home Mortgage Acceptance, Inc. (“AHMAI”), a \$311,250.00 promissory note secured by the property located at 6136 Benchmark Way, North Las Vegas, NV 89031 (the “Subject Property”). (Deed of Trust, ECF No. 53-1.) The Deed of Trust named Fidelity National Title (“Fidelity”), as the Trustee, and Mortgage Electronic Registration Systems, Inc. (“MERS”), as the lender’s “nominee.” (*Id.*) On September 25, 2008, MERS, as nominee, assigned AHMAI’s interest in the Deed of Trust to

1 American Home Mortgage Servicing, Inc. (“AHMSI”). (Assignment of Deed of Trust, ECF
2 No. 53-2.) In addition, the Court has taken judicial notice of an additional assignment in which
3 MERS, as nominee for AHMSI, purported to assign AHMSI’s interest in the Deed of Trust to
4 Bank of New York (“BONY”). (Assignment of Deed of Trust, ECF No. 53-5.) Although this
5 document states that it was executed on November 25, 2009, it also states that this assignment
6 was effective on October 27, 2004, despite the fact that the AHMSI did not become the
7 beneficiary until September 25, 2008. (*Compare* Assignment of Deed of Trust, ECF No. 53-5
8 *with* Assignment of Deed of Trust, ECF No. 53-2.) Thereafter, on September 2, 2008, BONY,
9 the purported beneficial interest holder, executed a substitution of trustee in which BONY
10 attempted to substitute AHMSI Default Services, Inc., in place of Fidelity, as trustee.
11 (Substitution of Trustee, ECF No. 53-3.) Also on September 2, 2008, AHMSI Default
12 Services, “as duly appointed Trustee,” recorded a Notice of Default and Election to Sell on
13 behalf of “the present Beneficiary.” (Notice of Default, ECF No. 53-4.)

14 In response to these foreclosure proceedings, Plaintiff initiated this action on February 1,
15 2011, by filing a Complaint before this Court alleging various causes of action. (Compl., ECF
16 No. 1.) After granting Defendants’ first Motion to Dismiss, the Court gave Plaintiff leave to
17 amend his Complaint by January 3, 2012. (Order, Dec. 8, 2011, ECF No. 41.) Plaintiff filed his
18 Third Amended Complaint on February 13, 2012 in which Plaintiff alleged two causes of
19 action: (1) Statutorily Defective Foreclosure under section 170.080 of the Nevada Revised
20 Statutes; and (2) Quiet Title. (ECF No. 49.) The Court later dismissed Plaintiff’s cause of
21 action for Quiet Title, but found that Plaintiff had sufficiently stated a cause of action for
22 Statutorily Defective Foreclosure. (Order, Jan. 2, 2013, ECF No. 77.) Specifically, the Court
23 determined that Plaintiff had adequately alleged that Defendants failed to satisfy the
24 requirements of section 107.080 when Defendants recorded the Notice of Default. (*Id.* at 6:6–
25 20.) Specifically, the Court concluded that the publicly recorded documents appeared to

1 indicate that “the Notice of Default was not recorded by the beneficiary, successor in interest of
2 the beneficiary, or the trustee at the time of the recording.” (*Id.* at 6:16–18.) Thus, Plaintiff’s
3 cause of action for Statutorily Defective Foreclosure survived Defendants’ second motion to
4 dismiss, for which the statutory remedy is voiding the trustee’s sale. *See Nev. Rev. Stat.*
5 § 107.080(5)

6 Thereafter, on April 11, 2013, Defendants filed a Motion Authorizing Recordation of
7 Rescission of Trustee’s Deed Upon Sale, (ECF No. 95), which the Court granted at the April
8 23, 2013 hearing. Specifically, Defendants stated that “[o]nce the Trustee’s Deed Upon Sale
9 has been rescinded, Defendants intend to record and serve a new Substitution of Trustee and
10 Notice of Trustee’s Sale, which will resolve the issues identified in various orders entered by
11 this Court.” (Mot. 5:18–20, ECF No. 95.) Defendants further represented that after the
12 rescission was recorded, they “intend[ed] to file a motion requesting an order dismissing this
13 action as moot and expunging the Notice of *Lis Pendens* recorded by Plaintiff.” (*Id.* at 5:20–
14 22.) Despite these representations to the Court, Defendants neither recorded the rescission nor
15 filed the motion to dismiss as moot. Instead, Defendant T.D. Service filed a Motion for
16 Summary Judgment. (ECF No. 108.)

17 In its motion, T.D. Service asserts that summary judgment is appropriate for two
18 reasons. First, T.D. Service asserts that the fact that Plaintiff was in default precludes Plaintiff
19 from recovering money damages for his statutorily defective foreclosure claim. (Mot. for
20 Summ. J. 6:6–9:5, ECF No. 108.) Second, T.D. Service argues that the Notice of Default was
21 properly recorded because the current beneficiary under the deed of trust later ratified the
22 foreclosure proceedings. (*Id.* at 9:6–10:12.) For the reasons discussed at the March 14, 2014
23 hearing and for the reasons discussed below, the Court rejects these arguments and DENIES
24 T.D. Service’s Motion for Summary Judgment.

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1 **II. LEGAL STANDARD**

2 The Federal Rules of Civil Procedure provide for summary adjudication when the
 3 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
 4 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
 5 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
 6 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
 7 (1986). A dispute as to a material fact is genuine if there is a sufficient evidentiary basis on
 8 which a reasonable fact-finder could rely to find for the nonmoving party. *See id.* “The amount
 9 of evidence necessary to raise a genuine issue of material fact is enough ‘to require a jury or
 10 judge to resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral*
 11 *Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S.
 12 253, 288–89 (1968)). “Summary judgment is inappropriate if reasonable jurors, drawing all
 13 inferences in favor of the nonmoving party, could return a verdict in the nonmoving party’s
 14 favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United*
 15 *States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary
 16 judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*,
 17 477 U.S. 317, 323–24 (1986).

18 In determining summary judgment, a court applies a burden-shifting analysis. When, as
 19 here, the nonmoving party bears the burden of proving the claim or defense, the moving party
 20 can meet its burden in two ways: (1) by presenting evidence to negate an essential element of
 21 the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a
 22 showing sufficient to establish an element essential to that party’s case on which that party will
 23 bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party
 24 fails to meet its initial burden, summary judgment must be denied and the court need not
 25 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–

60 (1970). If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). However, because the Court finds that T.D. Service has failed to meet its initial burden, the Court need not determine whether Plaintiff can establish the existence of a genuine issue of material fact.

III. DISCUSSION

The Court first notes that T.D. Service does not appear to dispute that the foreclosure proceedings of the Subject Property were defective. Specifically, T.D. Service does not dispute that the party that filed the Notice of Default had not been properly substituted by the holder of the beneficial interest in the Deed of Trust at the time that the Notice of Default was recorded. Rather, T.D. Service asserts that Plaintiff's claim fails because Plaintiff was in default on his loan. In addition, T.D. Service argues that Plaintiff's claim fails because the foreclosure proceedings were later ratified by the present beneficiary. However, both of these arguments fail. Therefore, the Court DENIES T.D. Service's Motion for Summary Judgment.

T.D. Service first asserts that Plaintiff cannot recover under his statutorily defective foreclosure cause of action because Plaintiff is only entitled to money damages if he can establish that he has not defaulted on his loan. All parties recognize that Plaintiff was delinquent on his mortgage payments. Nevertheless, this argument fails because T.D. Service is conflating two separate causes of action: the tort of wrongful foreclosure and statutorily defective foreclosure under section 107.080 of the Nevada Revised Statutes.

Each of the cases on which T.D. Service relies discusses whether a Plaintiff can recover damages under the *tort of wrongful foreclosure*. *See, e.g., Berilo v. HSBC Mortg. Corp.*, No. 2:09-cv-02353-RLH-PAL, 2010 WL 2667218, at *3 (D. Nev. June 29, 2010) ("Although NRS 107.080 does not provide plaintiff homeowners with a private right of action *for tort damages*, *it does allow a court to void a trustee sale.*" (emphasis added)). The Court agrees, and has for

1 some time, that Plaintiff cannot recover under the tort cause of action for wrongful foreclosure.
2 (See Order, Dec. 8, 2011, 6:9–14, ECF No. 41 (“Unfortunately, even though there may be a
3 claim for a statutorily defective foreclosure, *Plaintiff has failed to state a claim for the tort of*
4 *wrongful foreclosure* pursuant to Nevada law because he does not dispute his delinquency on
5 the mortgage payments.” (emphasis added) (citing *Collins v. Union Fed. Sav. & Loan Ass’n*,
6 662 P.2d 610 (Nev. 1983)).) However, this argument does not affect whether Plaintiff is
7 entitled to an order from this Court voiding the trustee’s sale because of defects in the
8 foreclosure proceedings. Thus, T.D. Service’s argument based on Plaintiff’s default is
9 inapplicable to Plaintiff’s surviving cause of action for statutorily defective foreclosure under
10 section 107.080. As such, T.D. Service has failed to persuade this Court that summary
11 judgment is appropriate.

12 T.D. Service’s second argument also fails. The Court first notes that T.D. Service has
13 failed to provide any controlling case law that supports its position that summary judgment is
14 proper because the beneficiary ratified the allegedly unauthorized foreclosure proceedings. In
15 contrast, T.D. Service solely relies on one non-controlling case from this district. (See Mot. for
16 Summ. J. 9:17–25 (citing *Hernandez v. IndyMac Bank*, No. 2:12-cv-00369-MMD-CWH, 2012
17 WL 5381533, at *4 (D. Nev. Oct. 31, 2012)).) In *Hernandez v. IndyMac*, the holder of the
18 beneficial interest provided additional evidence that it had authorized the purported trustee to
19 initiate the foreclosure proceedings. *Hernandez*, 2012 WL 5381533, at *4. Furthermore, the
20 language in the notice of default left open the possibility that the purported trustee could have
21 been acting as “an agent for the trustee or beneficiary.” (*Id.* (internal quotation marks omitted)
22 (“[T]his ‘catch all’ language saves [the beneficiary]: [the purported trustee] employed the
23 disjunctive ‘or’ to offer itself as *possibly* an ‘agent for the trustee or beneficiary.’”).)

24 In contrast, here, AHMSI Default Services, the party that recorded the Notice of Default
25 relating to the Subject Property, expressly stated that it was the “duly appointed Trustee” of the

1 “present Beneficiary.” (Notice of Default, ECF No. 56-4.) Based on the evidence in the
2 record, BONY attempted to execute the substitution of AHMSI Default Services, Inc. as trustee
3 on the same date that AHMSI Default Services, Inc. recorded the Notice of Default. However,
4 it appears that, on this date, the beneficial interest in the Deed of Trust had not yet been
5 properly assigned to BONY. Specifically, AHMSI, the entity that attempted to assign the
6 beneficial interest to BONY effective October, 27, 2004, did not itself hold the beneficial
7 interest until nearly four years later, when AHMAI assigned the beneficial interest to AHMSI
8 on September 25, 2008. Thus, there is no evidence that AHMSI Default Services, Inc was
9 actually the “duly appointed Trustee” when it recorded the Notice of Default because BONY
10 was not authorized to execute the Substitution of Trustee.

11 Furthermore, even to the extent that the Court were to consider *Hernandez v. IndyMac*
12 as persuasive authority, the Court is more persuaded by the reasoning in *Dyer v. American*
13 *Mortgage Network, Inc.*, No. 3:11-cv-00172-RCJ-VPC, 2012 WL 1684571, at *1 (D. Nev. May
14 14, 2012). In *Dyer*, the court denied the defendants’ motion for summary judgment and
15 concluded that a beneficiary could not ratify foreclosure proceedings where that beneficiary
16 “was not the person on whose behalf [the trustee] purported to act when filing the [Notice of
17 Default].” *Id.* Similarly, in the present case, T.D. Service has failed to provide any evidence
18 that BONY could be the “present Beneficiary,” to which the Notice of Default refers. As
19 discussed above, AHMSI, the entity that assigned the beneficial interest to BONY, did not itself
20 receive the beneficial interest until after the Notice of Default was recorded. (*Compare*
21 *Assignment of Deed of Trust*, ECF No. 53-5 *with* *Assignment of Deed of Trust*, ECF No. 53-2.)
22 Thus, based on the evidence in the record, BONY could not ratify the actions of the AHMSI
23 Default Services, Inc. because, as in *Dyer*, BONY was not the beneficiary when AHMSI
24 Default Services, Inc. recorded the Notice of Default. Any later ratification by BONY “would
25 merely be a ratification of a wrongful act, i.e., the filing of the [Notice of Default] by an entity

1 that was neither the beneficiary, trustee, or agent of either.” *Dyer*, 2012 WL 1684571, at *1
2 (citing Nev. Rev. Stat. § 107.080(2)(c)).

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Motion for Summary Judgment (ECF No. 108) filed
5 by Defendant T.D. Service Company is **DENIED**.

6 **DATED** this 17th day of July, 2014.

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11 Gloria M. Navarro, Chief Judge
12 United States District Judge
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